CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SEP 6 2005

Robert R. Di Trolio
Clerk of the Court
U.S. Tax Court
400 Second Street, N.W., Room 111
Washington, D.C. 20217

Re: Proposed Amendments to Tax Court's Rules of Practice and Procedure

Dear Mr. Di Trolio:

We appreciate the opportunity to comment on the proposed amendments to the Tax Court's Rules of Practice and Procedure. The proposed amendments address the court's rulemaking process, provide rules for reassignment of a case from a Special Trial Judge to a Presidentially appointed Judge, and modify the rules of admission and the disciplinary rules. We believe that the proposed amendments improve upon the existing rules. We respectfully offer the following additional comments and suggestions with regard to the proposed amendments.

Court's Proposed Amendments

T.C. Rule 1. Rulemaking Authority; Publication of Rules and Amendments; Construction

The proposed replacement to Rule 1(a) provides for public notice and an opportunity to comment on proposed changes to the Tax Court's Rules. This process will offer the court an important perspective on any proposed rule changes. The proposed amendment does make a change that merits comment, however. The proposal deletes reference in the title to "Scope of the Rules" and it deletes the general statement in the current rule that "These Rules govern the practice and procedure in all cases and proceedings in the United States Tax Court." We recommend that the court retain this language as a matter of clarity.

Although not part of the proposed Rule, we note that in the Explanation of the proposed amendment the quotation from footnote 1 of Ballard v. Commissioner, 544 U.S. __ (2005), 125 S.Ct. 1270 (2005), in the explanation for the rule changes contains two

typographical errors. In the third line of the quotation, the word "amendment" should be "amendments." In the fifth line, the word "rules" should be "rule."

T.C. Rule 182(e). Procedure in Event of Assignment to a Judge

We have no comments on this proposed Rule.

T.C. Rule 183. Other Cases

The proposed language for Rule 183 sets out the procedures for a case tried before a Special Trial Judge, restoring the language of former Rule 182 in response to the opinion of the United States Supreme Court in Ballard v. Commissioner, 544 U.S. --, -- n.1, 125 S.Ct. 1270, 1275 n.1 (2005). We recommend that Proposed Rule 183(b) give more guidance on the form of the "specific, written objections" to a Special Trial Judge's findings of fact and conclusions of law. The phrase "specific, written objections" has a parallel in Fed. R. Civ. P. 72(b) pertaining to the filing of objections to a magistrate judge's findings and recommendations on dispositive motions and other matters. In these cases, however, the parties must file objections as a predicate to *de novo* review by the district court of those portions of the report to which a party objects, and as a means to preserve their right to appeal the district court's order. The Advisory Committee Notes to the 1983 Addition of the Federal Rules of Civil Procedure state that the term "de novo" signifies that the magistrate judge's findings are not protected by the clearly erroneous doctrine. Thus, specific, written objections under Fed. R. Civ. P. 72(b) serve to identify particular findings and recommendations to which the district court must give fresh consideration. Proposed Rule 183, by contrast, does not contemplate *de novo* review of a Special Trial Judges' report. Instead, subsection (c) provides that

> Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

Therefore, unlike Fed. R. Civ. P. 72(b), the specific, written objections under Proposed Rule 183 should focus on the parties' arguments for rebutting the presumption of correctness associated with the recommended findings of fact of the Special Trial Judge. No purpose would be served by requiring the parties to repeat legal arguments already set out in briefs or other submissions to the Special Trial Judge because the Tax Court Judge will have full access to the record. Because the phrase "specific, written objections" in Proposed Rule 183 serves a different purpose than that same phrase when used in Fed. R. Civ. P. 72(b), the court should consider clarifying Proposed Rule 183 regarding the nature of the objections that the parties must file. Absent clarification, objections will likely be similar to the objections to the requested findings of fact and legal analysis included in an opening brief.

As noted above, Proposed Rule 183(c) provides that the Judge assigned to prepare the report must give "due regard" to the findings of the Special Trial Judge, as the Special Trial Judge has first-hand knowledge of the proceedings. The proposed Rule, however, does not define "due regard." We recommend the addition of some guidelines on the application of "due regard," *e.g.*, that the Judge must accept the findings unless clearly erroneous or contrary to law. See Fed. R. Civ. P. 72(a) (applying a clearly erroneous or contrary to law standard in nondispositive matters assigned to magistrate judges).

T.C. Rule 200. Admission to Practice and Periodic Registration Fee

We recommend that the court add to Proposed Rule 200(a)(1) and (2) a requirement that a practitioner who is an attorney notify the Tax Court if the practitioner's state bar membership is revoked as a result of a conviction or discipline or cancelled for a non-disciplinary reason. We also recommend that a time period be set for this notification, such as within 30 days of the event. There have been cases in which neither the court nor the respondent discovered that a member of the Tax Court bar had been disbarred until after the case had become final. A notification requirement in the Tax Court's Rules might help prevent this from occurring in the future.

T.C. Rule 202. Disciplinary Matters

We have no comments on this proposed Rule.

We appreciate the opportunity to provide the court with our comments on the proposed amendments, and we are available to further assist the court in this regard should additional questions or concerns arise.

Sincerely,

Donald L. Korb
Chief Counsel
Internal Revenue Service

cc: Chief Judge Gerber
Judge Thornton, Chair, Rules Committee
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September 6, 2005

Mr. Robert R. Di Trolio
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Washington, D.C. 20217

Re: Comments Concerning the Proposed Amendments to Rules 1, 182(e), 183, 200 and 202 of the United States Tax Court Rules of Practice and Procedure

Dear Mr. Trolio:

These comments are submitted on behalf of the Section of Taxation[1] of the American Bar Association concerning the amendments proposed on July 7, 2005 by the United States Tax Court[1] to its Rules of Practice and Procedure. These proposed amendments concern the Court's rulemaking authority, the procedures to be followed when a case tried by a special trial judge is reviewed by a regular Tax Court judge, the rules for admission to practice, and the rules governing disciplinary matters. We are writing in response to Chief Judge Joel Gerber's invitation for public comment to be received by September 6, 2005. It is our understanding that the American Bar Association Center for Professional Responsibility may separately comment on the proposed amendments.

Discussion

The Court issued the proposed amendments to its Rules principally in response to the United States Supreme Court's decision in *Ballard v. Commissioner*, 544 U.S. ____, 125 S.Ct. 1270 (2005). The Supreme Court's opinion expressed concern about the Court's procedures relating to Special Trial Judge reports. *Id.* at 1282-1283. The Supreme Court also questioned the absence of any public rule-making procedures with respect to proposed amendments to the Court's rules. *Id.* at 1275 n.1. In addition to responding to these two issues, the proposed amendments update the Court's procedures concerning discipline and admission to practice. In our view, the proposed amendments respond appropriately to the concerns expressed in *United States v. Ballard*, and we welcome the proposed amendments concerning admission to practice and disciplinary matters.

Proposed Amendments to Rule 1.

The revisions to Rule 1 provide appropriate public notice and the opportunity to comment on proposed changes to the Court's rules governing its practice and procedure. The addition of notice and comment provisions is a very positive change and will align the Court's rule-making process with the process followed by other judicial and administrative bodies.

Proposed Amendments to Rule 182.

We agree with the proposed addition of paragraph (e) to Rule 182. For clarity, we suggest the first line of the first sentence be worded instead as follows:

In the event the Chief Judge assigns a case...

Proposed Amendments to Rule 183.

We agree with the Court's proposed revisions to Proposed Rule 183. We suggest that an additional sentence be added to proposed Rule 183(c), after the first sentence of the proposed Rule, to read as follows:

The Judge's actions on the Special Trial Judge's recommended findings of fact and conclusions of law shall be reflected in the record by an appropriate order or report.

Although we do not recommend any specific change to the last sentence of proposed Rule 183(c), we observe that, as proposed, Rule 183(c) does not directly address the standard of review contemplated by the "due regard" and "presumed to be correct" language. Furthermore, our research suggests that the precise standard of review contemplated by "due regard" and "presumed to be correct" is uncertain. We also comment that the appropriate standard of review to be employed under proposed Rule 183(c) might vary, depending upon the circumstances. For instance, in cases in which the reviewing Judge simply reviews the record before the Special Trial Judge, a "clearly erroneous" standard with respect to factual matters might be most appropriate. In cases in which the reviewing Judge conducts additional proceedings, such as rehearing testimony or taking additional testimony, a standard other than "clearly erroneous" would likely be more suitable.

Proposed Amendments to Rule 200.

The Tax Court includes the application forms for admission to the United States Tax Court on its website, which is a great service to potential applicants. We recommend advising potential applicants of this service by adding the following sentence before the last sentence of proposed Rule 200(b).

Application forms are also available on the Tax Court's website.

Proposed Amendments Rule 202.

We commend the Court for updating the rules governing disciplinary proceedings. We have one suggestion in this regard. Proposed Rule 202(c) requires a written response to be filed to a show cause order "within such period as the Court may direct."

We recommend that such period be no less than 30 days to allow a practitioner a sufficient period of time to prepare a response.

If there are questions regarding these comments you may contact Elizabeth Copeland, c/o Oppenheimer, Blend, Harrison & Tate, Inc., 711 Navarro, Sixth Floor, San Antonio, Texas 78258, 210.299.2347.

Sincerely,

Dennis B. Drapkin
Chair

[1] Principal responsibility for these comments was exercised by Mary A. McNulty, Elizabeth A. Copeland, Leandra Lederman, and Christopher M. Pietruszkiewicz, members of the Court Procedure and Practice Committee of the Section of Taxation of the American Bar Association. These Comments were also reviewed by Rajiv Madan and Anita Soucy, members of the Administrative Practice Committee of the Section of Taxation; by Kenneth W. Gideon on behalf of the Section of Taxation's Committee on Government Submissions; and by Charles A. Pulaski, Jr., Council Director for the Court Procedure and Practice Committee. These comments represent the position of the ABA Section of Taxation and have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and, accordingly, should not be construed as representing the policy of the Association.

[2] Hereinafter, the United States Tax Court may also be referred to as simply the "Court".

AMERICAN BAR ASSOCIATION

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September 6, 2005

Mr. Robert R. Di Trolio
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Washington D.C. 20217

Re: Comments Regarding Proposed Amendments to Rules 200 and 202 of the United States Tax Court Rules of Practice and Procedure

Dear Mr. De Trolio:

On behalf of the ABA Standing Committee on Professional Discipline and the ABA Center for Professional Responsibility we appreciate the opportunity to comment on the proposals by the United States Tax Court to amend its Rules of Practice and Procedure. We have read the proposed amendments to Rule 200 and 202 as they relate to admission and disciplinary proceedings. Based upon existing ABA policy, as described specifically below, we offer the following comments and suggestions on the proposed amendments as they relate to practitioners before the Court who are lawyers.

A. Proposed Amendments to Rule 200—Admission to Practice and Periodic Registration Fee

The Discipline Committee and the Center suggest that the Court consider adding a sentence to Rule 200(b) stating that application forms for admission to practice before the Tax Court are available on the Court's website at www.ustaxcourt.gov.

We commend the Court for its usage of the registration fee described in Rule 200(g) to compensate independent counsel appointed to assist the Court with disciplinary proceedings. This is consistent with longstanding ABA policy set forth in Rule XI of the ABA Model Federal Rules of Disciplinary Enforcement. Rule XI recommends that the registration fee be assessed on an annual basis.

Additionally, it is laudable that the Court has retained the provisions of Rule 200 providing that a failure to pay the registration fee will result in an individual being placed on the Ineligible List until the current fee and any arrearages are paid. This too is consistent with ABA policy as set forth in the

Model Federal Rules of Disciplinary Enforcement. A copy of the Model Federal Rules of Disciplinary Enforcement, adopted by the ABA House of Delegates in 1978, is being provided with this letter.

B. Proposed Amendments to Rule 202—Disciplinary Matters

The Discipline Committee and the Center also have several recommendations regarding the Court's proposed changes to Rule 202. Each of these comments is intended to enhance the Court's disciplinary process and is reflected in existing ABA policy. In fact, the version of Rule 202 that the Court is seeking to amend currently follows the ABA Model Federal Rules of Disciplinary Enforcement in many respects.

1. Retaining Procedures For Appointed Counsel's Investigation and Prosecution of Charges of Misconduct

The first recommendation relates to the Court's proposed deletion of what was Rule 202 (b) (1) through (4). Those provisions set forth a procedure whereby the Court may appoint counsel to investigate and prosecute allegations of misconduct against practitioners before the Court as well as procedures for the initiation and hearing of formal proceedings. Those provisions followed, in many respects, the language of Rule V. of the ABA Model Federal Rules of Disciplinary Enforcement. The Court is now recommending the deletion of those subparagraphs relating to assigned counsel's investigation and recommendation for disposition of the matter. The Center recommends that the Court retain those provisions as they provide a mechanism for investigating allegations of misconduct and, if appropriate, recommending to the Court that the matter not proceed due to a lack of sufficient evidence, deferral pending the resolution of another proceeding or for any other valid reason. The portions that relate to the initiation of formal charges via issuance of a rule to show cause and subsequent hearing have been moved to what the Court proposes would be Rule 202(c).

With respect to the Court's proposed Rule 202 (c), the Court should consider adding a provision that a practitioner must respond to the rule to show cause within thirty days. The Rule as proposed states that the response must be filed "within such period as the Court may direct." A thirty day response time is consistent with Rule V. (c) of the Model Federal Rules of Disciplinary Enforcement as well a the Court's previous iteration in Rule 202(b) (3).

The Discipline Committee and the Center suggest that the Court also consider amending Rule 202 by adopting various procedures that are currently missing, but that are set forth in the Model Federal Rules of Disciplinary Enforcement. These procedures will further enhance and expedite the Court's disciplinary proceedings and promptly protect the public and the Court from unfit practitioners.

2. Reciprocal Disciplinary Procedures For Discipline Imposed By Other Courts

The Court should consider amending Rule 202 to provide that practitioners before the Court who are lawyers be required to promptly notify the Court when they have been subject to public discipline by another jurisdiction so that the Court may initiate reciprocal disciplinary proceedings.

Rule II. of the ABA Model Federal Rules of Disciplinary Enforcement sets forth a reciprocal disciplinary process that provides:

> A. Any lawyer admitted to practice before this Court shall, upon being subjected to public discipline by any other Court of the United States or the District of Columbia, or by a court of any state, territory, commonwealth or possession of the United States, promptly inform the Clerk of this Court of such action.
>
> B. Upon the filing of a certified or exemplified copy of a judgment or order demonstrating that a lawyer admitted to practice before this Court has been disciplined by another Court, this Court shall forthwith issue a notice directed to the lawyer containing:
>
> 1. a copy of the judgment or order from the other court; and
> 2. an order to show cause directing that the lawyer inform this Court within 30 days after service of that order upon the lawyer, personally or by mail, of any claim by the lawyer predicated upon the grounds set forth in (D) hereof that the imposition of the identical discipline by the Court would be unwarranted and the reasons therefor.
>
> C. In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this Court shall be deferred until such stay expires.
>
> D. Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (B) above, this Court shall impose the identical discipline unless the respondent-lawyer demonstrates, or this Court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:
>
> 1. that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
> 2. that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject; or
> 3. that the imposition of the same discipline by this Court would result in grave injustice; or

4. that the misconduct established is deemed by this Court to warrant substantially different discipline.

Where this Court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

E. In all other respects, a final adjudication in another court that a lawyer has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in the Court of the United States.

F. This Court may at any stage appoint counsel to prosecute the disciplinary proceedings.

3. Effect of Other Jurisdictions' Orders of Resignation With Disciplinary Charges Pending and Disbarment on Consent

Proposed Rule 202(a) (2) states that a lawyer who has been disbarred by consent or who has resigned with charges pending may be subject to discipline by the Tax Court. Based upon our reading of the proposed Rule, such a lawyer would be subject to full disciplinary proceedings as described in subparagraph (c). Instead, the Model Federal Rules of Disciplinary Enforcement suggest an expedited procedure. Rule III. of the ABA's Model Federal Rules provides that a lawyer admitted to practice before the Court, who is disbarred on consent or who resigns while disciplinary charges are pending shall cease to be permitted to practice before the Court upon the filing of a certified copy of the order of resignation or disbarment on consent. The Rule further provides that the lawyer is required to notify the Court of the entry of any such disciplinary order by another jurisdiction.

4. Immediate Interim Suspensions For Criminal Convictions

The Discipline Committee and the Center further recommend that the Court amend Rule 202 to provide for the immediate interim suspension of lawyer-practitioners who are convicted of crimes pending the final disposition of a disciplinary proceeding. Rule I. of the ABA Model Federal Rules of Disciplinary Enforcement states:

> A. Upon the filing with this Court of a certified copy of a judgment of conviction demonstrating that any lawyer admitted to practice before the Court has been convicted in any Court of the United States, or the District of Columbia, or of any state, territory, commonwealth or possession of the United States of a serious crime as hereinafter defined, the Court shall enter an order immediately suspending that lawyer, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of any appeal, until final disposition of a disciplinary proceeding to be commenced upon such conviction. A copy of such order shall immediately be served upon the

lawyer. Upon good cause shown, the Court may set aside such order when it appears in the interest of justice so to do.

B. The term "serious crime" shall include any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

C. A certified copy of a judgment of conviction of a lawyer for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that lawyer based upon the conviction.

D. Upon the filing of a certified copy of a judgment of conviction of a lawyer for a serious crime, the Court shall in addition to suspending that lawyer in accordance with the provisions of this Rule, also refer the matter to counsel for the institution of a disciplinary proceeding before the Court in which the sole issue to be determined shall be the extent of the final discipline to be imposed as a result of the conduct resulting in the conviction, provided that a disciplinary proceeding so instituted will not be brought to final hearing until all appeals from the conviction are concluded.

E. Upon the filing of a certified copy of a judgment of conviction of a lawyer for a crime not constituting a "serious crime," the court may refer the matter to counsel for whatever action counsel may deem warranted, including the institution of a disciplinary proceeding before the court; provided, however, that the Court may in its discretion make no reference with respect to convictions for minor offenses.

F. A lawyer suspended under the provisions of this Rule will be reinstated immediately upon the filing of a certificate demonstrating that the underlying conviction of a serious crime has been reversed but the reinstatement will not terminate any disciplinary proceeding then pending against the lawyer, the disposition of which shall be determined by the Court on the basis of all available evidence pertaining to both guilt and the extent of discipline to be imposed.

Such an interim suspension is necessary to protect both the public and to maintain confidence in the profession and the Court. Continued practice by a lawyer found guilty of a serious crime undermines the public's confidence and the administration of justice because it permits such an individual to continue to serve as an officer of the Court in good standing. The interim suspension preserves the respect and dignity of the Court until the case proceeds to a final disciplinary judgment.

5. Disbarment on Consent Before the Tax Court

Finally, the Discipline Committee and the Center suggest that the Court amend Rule 202 to provide that a lawyer-practitioner who is subject to an investigation of

allegations of misconduct or formal disciplinary proceedings be able to consent to disbarment by submitting an affidavit to the Court with request that it enter an order for such a sanction. The affidavit, consistent with Rule VI. of the ABA Model Federal Rules of Disciplinary Enforcement, should state that:

> 1. the lawyer's consent is freely and voluntarily rendered; the lawyer is not being subjected to coercion or duress; the lawyer is fully aware of the implications of so consenting;
>
> 2. the lawyer is aware that there is a presently pending investigation or proceeding involving allegations that there exist grounds for the lawyer's discipline the nature of which the lawyer shall specifically set forth;
>
> 3. the lawyer acknowledges that the material facts so alleged are true; and
>
> 4. the lawyer so consents because the lawyer knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, the lawyer could not successfully defend himself.

The Court's order disbarring the lawyer-practitioner on consent should be a matter of public record.

We thank the Court again for this opportunity to provide comments and suggestions regarding its proposed amendments to the Rules of Practice and Procedure. If the ABA Standing Committee on Professional Discipline or the Center for Professional Responsibility can be of further assistance, please do not hesitate to contact Jeanne P. Gray, Director of the Center, at 312/988-5293.

Sincerely,

Barbara Kerr Howe

The Hon. Barbara K. Howe
Chair, ABA Standing Committee on Professional Discipline

Jeanne P. Gray
Director, ABA Center for Professional Responsibility

Enclosure
cc: Mary M. Devlin, Regulation Counsel
Ellyn S. Rosen, Associate Regulation Counsel

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August 18, 2005

Robert R. Di Trolio
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RE: Proposed Rule Changes

Dear Mr. Di Trolio,

I write to commend the Tax Court for moving to amend Rule 183 of the Tax Court Rules and am submitting this comment in support of the proposed change (though there are two provisions that I believe need to be added to the new rule). Although these changes to Rule 183 were obviously prompted by the U.S. Supreme Court's recent decision in *Ballard v. C.I.R.*, the Tax Court's determination to return to the pre-1983 process for reviewing Special Trial Judge reports deserves praise.

First, as a general matter, the Tax Court is right to provide for the public disclosure of STJ reports immediately upon their filing with the Tax Court. I recently published a short article regarding the *Ballard* decision and how the Tax Court should amend its rules in response to the decision. *See* Norman R. Williams, "Special Trial Judges after Ballard: A Call for Reform," *Tax Notes*, May 23, 2005, pp. 1033-1038. I have enclosed a copy for your convenience. In particular, I expressly urged the Tax Court to amend its rules to provide for the disclosure of the STJ's report upon its filing with the Tax Court.

As I discussed, the Supreme Court's interpretation of Rule 183 creates an anomalous process. The Supreme Court technically held only that the STJ's report must be included in the record on appeal so that the U.S. Courts of Appeals can ensure that the Tax Court Judge has complied with Rule 183(c) in reviewing the STJ's report. Yet, effective appellate review can only be performed by allowing the parties to view the report so that they may craft their appellate arguments accordingly. Thus, the Supreme Court's interpretation of Rule 183 leads ineluctably to the conclusion that the Tax Court is obliged to disclose the STJ's report to the parties at some undefined time prior to the filing of appellate briefs.

Ballard left it to the Tax Court to decide when to make that disclosure, but the Tax Court's decision to serve the parties with the report when it is filed with the Court – the earliest possible point – is the correct one. As I discussed, there is no deliberative benefit to the Tax Court in concealing the report beyond that time. At the same time, such early disclosure allows

the parties to assess the report and raise any problems with it with the Tax Court itself, rather than awaiting appellate review.

Second, while *Ballard* does not entitle parties to file exceptions to the report, the Tax Court is right to provide for such process. As noted above, under *Ballard*, the parties are entitled to contest on appeal any modification or reversal made to the STJ's report by the Tax Court Judge. In light of that, it makes much greater sense to allow the parties to raise potential problems with the STJ's proposed findings of fact before the Tax Court Judge himself. In that way, the Tax Court Judge's review of the STJ's report can be guided by the parties rather than forcing the Tax Court Judge to perform his review *sua sponte*.

Of course, allowing the filing of exceptions may potentially prolong the adjudication of some cases, but concerns on this point are overblown in my view. Under the current system, Tax Court Judges are required to review the STJ's report and trial record on their own without guidance from the parties. As the *Ballard* case itself reveals, that process can take years. In contrast, with the benefit of briefing, the Tax Court Judge can focus his attention on those parts of the report and record that are material and in dispute. In that way, allowing the filing of exceptions will lead to both greater adjudicatory accuracy and efficiency.

Third, the only issue left unaddressed by the proposed change to Rule 183 is whether parties may raise new matters in their exceptions that they did not present in the post-trial briefs provided for by Rule 151. The proposed rule does not expressly address the matter, which I believe is a mistake. Prior to the 1983 rule change, Rule 182(c) (the precursor to current Rule 183) expressly provided in pertinent part:

> "Unless a party shall have proposed a particular finding of fact, or unless he shall have objected to another party's proposed finding of fact, the Court may refuse to consider his exception to the commissioner's report for failure to make such a finding desired by him or for inclusion of such finding proposed by the other party, as the case may be." 60 T.C. 1150.

I urge the Tax Court to adopt this language (or something similar) at the end of Rule 183(b) so as to make express the obligation of parties to raise any contested factual matters in the first instance with the STJ in post-trial briefs rather than awaiting the filing of exceptions. Absent such an express requirement, some parties may raise "new" factual matters in the exceptions that were not raised before the STJ, thereby effectively "sandbagging" the STJ and potentially confusing Tax Court review of the STJ's report.

Relatedly and at the same time, I would also make express that parties must file exceptions to the STJ's report to preserve a matter for Tax Court (or appellate) review; they may not refuse to file exceptions and expect the Tax Court Judge to identify *sua sponte* any contested factual issues. The exceptions need not repeat in full arguments made in the post-trial briefs, but they should do more than merely incorporate by reference such arguments. My proposed addition to Rule 183(c) would be "The Tax Court Judge may consider a party's failure to except to a particular finding of fact or conclusion of law as a waiver of any objection thereto." The accompanying explanatory comment could then make clear that, while the parties may not

simply incorporate by reference their post-trial briefs, they need not repeat in full the arguments made there and can refer back to the post-trial briefs to supplement their explanation of the basis for the exception. In this way, the Tax Court Judge could rely upon the statement of exceptions to guide his or her consideration of the STJ's report rather than having to read the potentially more voluminous post-trial briefs, which often cover factual matters that are not material to the dispute.

Lastly, I applaud the decision to open a formal public comment period for these rule changes and for subsequent rule amendments as proposed in Rule 1. Though I doubt that the Court will receive as many comments as do other federal courts with regard to proposed rule changes, the availability of such a process provides confidence to both practitioners and the public alike that rule changes are made in a fully informed and deliberative fashion.

If you have any questions or require additional explanation of these comments, I would be happy to discuss any of the foregoing comments with you further.

Sincerely,

Norman R. Williams
Assistant Professor of Law

Enclosure